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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-802

Supreme Court No. .....

Court of Appeals No. 71-1029

JOSEPH BARBARA, JR.
Petitioner,

v.

PERRY JOHNSON, Warden of the State Prison of Southern Michigan,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, by his attorneys, Frederick B. Bellamy and Neil H. Fink, pray that a Writ of Certiorari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

Petitioner was convicted in the Circuit Court for the County of Oakland, State of Michigan on August 13, 1969. Sentence was imposed on September 19, 1969. The Court of Appeals for the State of Michigan affirmed the conviction, and handed down an opinion, on April 29, 1970, set forth in Appendix A. Petitioner thereafter filed Application for Leave to Appeal to the Michigan Supreme Court, and on July 16, 1970 that Court denied said Application. The Order of Denial is set forth as Appendix B.

Petitioner then petitioned for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Michigan. Said petition was granted in that court's order and opinion of December 9, 1970 (Appendix C). The United States Court of Appeals for the 6th Circuit reversed the District Court on October 19, 1971 (Appendix D). Rehearing of the case was denied by an order issued on November 19, 1971 (Appendix E).

2. JURISDICTION

The opinion and judgment of the 6th Circuit Court of Appeals was entered on October 19, 1971. Rehearing was denied on November 19, 1971. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 (1).

3. QUESTION PRESENTED

The question presented by this petitioner is whether the Court of Appeals committed error in reversing the District Court's Order granting a Writ of Habeas Corpus which Order granting said Writ ruled in effect that Petitioner's constitutional right to a fair trial, by an impartial jury, was denied due to the repetitive and egregious acts of misconduct by witnesses Peter Lazaros and Delores Lazaros to-wit: the continuous injecture by said witnesses of extraneous, inflammatory and prejudicial matters including references to the Mafia in the presence of the jury.

4. STATUTES AND CONSTITUTIONAL PROVISIONS

The constitutional provision is involved herein:

The Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. STATEMENT OF THE CASE

Joseph Barbara, Jr., petitioner-appellee herein, was charged with the extortion of Mrs. Peter (Delores) Lazaros, contrary to MCLA 1948 §750.213 (MSA §28.410), the Michigan Extortion statute.

Trial commenced on August 1, 1969. The matter was submitted to the jury on August 12, 1969. The jury returned with a verdict of "Guilty" as charged. On September 19, 1969, the petitioner was sentenced to a term of 7 to 20 years in prison.

The petitioner appealed of right to the Court of Appeals of the State of Michigan. On April 29, 1970, the Court of Appeals, by written opinion, affirmed the conviction. On July 16, 1970, the Supreme Court of the State of Michigan denied the petitioner's Application for Leave to Appeal. *People v. Joseph Barbara, Jr.* (1970), 23 Mich App 540, leave denied 383 Mich 803.

Thereafter the petitioner filed a Complaint for Federal Habeas Corpus pursuant to 28 USC 2241-2254 [2241(c)(3)]. The State of Michigan responded by a Motion to Dismiss. Following submission of briefs, the Honorable Fred Kaess, District Judge, granted the writ. The State promptly claimed an appeal, and Judge Kaess thereupon admitted the petitioner to bail and granted the State a Stay of Proceedings Pending Appeal.

The United States Court of Appeals for the Sixth Circuit vacated the Order granting the Writ of Habeas Corpus and remanded the cause to the District Court with instructions to dismiss the petition. The petitioner filed for a rehearing in the United States Court of Appeals with a suggestion that the said rehearing be held *en banc*. The

Court of Appeals denied the petition for rehearing *en banc*. The petitioner's rehearing *en banc* contained an alternative prayer for relief to-wit: that the Court of Appeals, if it did not grant the rehearing, remand the cause to the District Court with instructions to conduct a hearing to determine, to what extent, false testimony was given by one of the key prosecution witnesses at the state court trial. The alternative prayer for relief was also denied.

The predicate for the suggestion that false testimony may have been given during the State Court trial was the transcript of *voir dire* testimony of prospective jurors in a Federal trial entitled *United States v. Lazaros*, Criminal No. 14325 which trial was being conducted in the District Court of the United States for the Eastern District of Michigan, Southern Division. That case involved a twelve (12) count perjury indictment charging one Peter M. Lazaros (a key prosecution witness in petitioner's State Court trial) with various criminal violations involving false testimony before a Federal Grand Jury. During the questioning of the jury in the Lazaros trial, defense counsel, F. Lee Bailey, indicated that Lazaros would admit he lied to the grand jury as to all counts but that he was forced to do so by law enforcement officials. He further indicated that his perjury testimony was not a willful act on his part. One of the counts of the perjury indictment against Lazaros involved a subject matter which was also the subject of inquiry at petitioner's state court trial. Eventually during the trial Lazaros hedged as to that act of perjury maintaining that that was true but that the eleven (11) other acts of perjury alleged were indeed false but that he was forced to give that testimony.

6. REASONS FOR GRANTING THE WRIT

THE UNITED STATES DISTRICT COURT, IN GRANTING PETITIONER'S WRIT OF HABEAS CORPUS, CORRECTLY DETERMINED THAT APPELLEE'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL, BY AN IMPARTIAL JURY, WAS EFFECTIVELY OBLITERATED BY THE REPETITIVE AND EGREGIOUS ACTS OF MISCONDUCT BY WITNESSES, PETER LAZAROS AND DELORES LAZAROS, TO WIT, THE CONTINUOUS INJECTURE BY SAID WITNESSES OF EXTRANEOUS, INFLAMMATORY AND PREJUDICIAL MATTERS IN THE PRESENCE OF THE JURY.

The Sixth Amendment to the United States Constitution guarantees the right of an accused to a fair trial. The right to a fair trial is really the very essence of due process. The Fourteenth Amendment to the United States Constitution requires that no state shall deprive any person of life, liberty or property without due process of law.

As was eloquently stated in *Baker v. Hudspeth*, 129 F. 2d 779 [C.A. 10 (1942)]:

> "There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and 14th Amendments, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus. Ex parte Hans Neilsen, Petitioner, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118: In re Bonner, Petitioner,

151 U.S. 242, 259, 14 S.Ct. 323, 38 L.Ed. 149; Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed 1461; Bowen v. Johnston, 306 U.S. 19, 59 S.Ct. 442, 84 L.Ed. 455 and Huntley v. Schilder, 10 Cir., 125 F.2d 250. Cf. Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969; Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L. Ed. 791, 98 A.L.R. 406, and Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. * * * "

The Supreme Court of the United States has judicially recognized that a fair trial is the most basic guarantee afforded by the Federal Constitution and the atmosphere in which the trial is conducted must be conducive toward that end:

> "We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." *Estes v. State of Texas,* 381 U.S. 532, 540, 85 S.Ct. 1628, 1632.

It is petitioner's contention that he was denied his forementioned constitutional guarantee because of the conscious efforts of the witnesses Delores and Peter Lazaros to prejudice his right to a fair trial. Because of the Lazaros' patently deliberate and successful efforts to inject extraneous and highly prejudicial matters into the trial notwithstanding a pre-emptory instruction by the Court and several further instructions during the course of the trial, the defendant has suffered a conviction and a prison sentence predicated on a record that is certain to shock this Court's judicial conscience. Quoted below in verbatim fashion are those portions of the testimony of Peter and Delores Lazaros which petitioner claims were calculated to, and did in fact, inject prejudice into the record and deprive him of a fair trial:

Re-direct examination of Delores Lazaros conducted by Mr. Bain:

"Q. Delores—Mrs. Lazaros, you remember Mr. Barris directed your attention or our atention to page 11 of the statement which you made to me, and asked you if you hadn't told me at that time that the money was in the safe, that was taken, and I now direct your attention to this statement, which is four lines under what Mr. Barris read to you. 'Was the money in the same box the jewelry was in?' That was the question. And the answer was 'Yes', Do you remember making that statement?

A. Yes.

Q. You were also asked by Mr. Barris why you did not report this to various attorneys, one of whom was Mr. Albert. Do you know whether or not Mr. Albert was a friend of Mr. Barbara?

A. Yes, he was.

Q. And how did you first meet Mr. Albert?

A. I met Mr. Albert at the hospital.

Q. Who was present at that time?

A. Mr. Barbara, Mr. Albert and my husband and another attorney; I can't remember all of them.

Q. To your knowledge, do you know who brought Mr. Albert into the case?

A. I don't know what that was all about, but they were all friendly.

Q. Mr. Barris asked you a question regarding the letter which you brought from your doctor, it wouldn't be safe for you to testify, or he felt it would be to your best interest not to testify for at least three weeks. You're aware, are you not, that this case was set as early ago as last January?

A. Yes, I am.

Q. And was adjourned at the request of Mr. Barris' office.

A. Yes.

Q. And with one exception, it has been adjourned a number of times since then, at the request of their office, with the exception of the time

we previously adjourned it because of your condition?

A. *Yes, and not only that, when I came here it wasn't three weeks yet to go, it was only about 13 days. And I didn't think that that would make so much difference. He made it sound like I didn't care about my unborn child, but I have a retarded son that this man didn't mind doing all those horrible things in front of.* (emphasis supplied)

Mr. Barris: Your Honor, I object, and I have a matter to take up in the absence of the jury.

The Court: Escort the jury into the jury-room.

(Jury leaves the courtroom)

The Court: The record may show the jury is not in the courtroom.

Mr. Barris: Your Honor, at this time, in the absence of the jury, I move for a mistrial. It's bad enough when Mr. Barbara has to go to trial in a situation where I have to cross-examine a pregnant woman and an obviously pregnant woman, that's already been raised on the record, here we have this witness volunteering a highly prejudicial statement against my client. The record doesn't show she's in tears.[1] I say, under these circumstances, it's very, very hard, if not impossible to get anything that even remotely represents a fair trial. It's not Mr. Bain's fault. He didn't ask her anything to

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[1] At this juncture counsel wishes to direct the Court's attention to *Collum v. State*, 107 Southern 35. In that case appellant was charged with seduction. The witness who was alleged to have been seduced fainted in the witness chair, whereupon the Court sent for her mother. The mother appeared in the Court in the presence of the jury weeping and said in substance, "Nobody knows how we have suffered over this trouble. Lord have mercy on us." The appellant moved for a mistrial which was denied. The Alabama Court of Appeals held that the denial of the motion for a mistrial is reversible error stating that the question is not whether the occurrence in the presence of the jury did in fact influence the verdict but whether it might have done so. The Court further stated; "The average man fears not the bayonet as he does a woman's tears."

bring out this outburst. It's not Mr. Barbara's fault or my fault. It's a fact of life. Here we have a woman, pregnant, who makes these sort of remarks about my client. It was with the greatest misgivings I even started the case where I knew I'd have to cross-examine a pregnant woman. Now we have the problem compounded by the latest outburst of Mrs. Lazaros. So I move for a mistrial.

Mr. Bain: I, of course, as much as anyone in the courtroom, want to see Mr. Barbara have a fair trial. The question—it was not responsive to my question—or the answer was not responsive to my question. There's no question about that. I personally don't feel the answer was such that it would prejudice the jury beyond the point where they can bring back a fair, impartial verdict. I'm going to leave it to the Court's final discretion.

The Court: I'm going to deny the motion. Mrs. Lazaros, you're going to just have to answer the question. I don't want to go through this—a mistrial means wer're going to stop this trial and start all over again. I don't want to do this again, and neither do you, so listen to the questions, answer the questions, and don't volunteer things.

A. I didn't mean anything. He was trying to make out before I didn't care anything about my unborn child.

The Court: Just listen to the question and answer the question. Motion for mistrial is denied, but you're cautioned to just answer the questions. Return the jury."

Direct examination of Peter Lazaros conducted by Mr. Bain:

"Q. State your full name for the Court, please, Mr. Lazaros?

A. Peter Nicholas Lazaros.

Q. And your address?

A. 2410 Dalesford Road, Troy, Michigan.

Q. And directing your attention, Mr. Lazaros, to March of 1968, did you have occasion, in that month, to go to Jackson Prison?

A. Yes, I have.

Q. Was that as a result of a conviction sustained in this Circuit Court?

A. Yes, sir.

Q. And what were you convicted of?

A. Well, that was back in 1960, I was convicted of defrauding a loan company named Public General—General Public Loan Corporation.

Q. How many counts were you indicted and tried on?

A. I believe it was two or three, but I was found innocent on one or two. I don't remember exactly.

Q. How many were you convicted of?

A. One or two.

Q. Prior to the time that you went to Jackson Prison, did you have occasion to meet Joe Barbara?

A. Yes, sir.

Q. Would you identify Mr. Barbara for the Court, please?

A. *Yes, that's the THING standing over there."*[2] (emphasis supplied)

Cross examination of Peter Lazaros by Mr. Barris:

"Q. Is this gentleman to whom I'm pointing Mr. Kilbee, of the State Police?

A. He could be there, yes.

Q. Well, you've been virtually living with this man for months?

A. Not with that man only, Mr. Louisell.

Q. All right, let me ask you this, that was no slip of the tongue when you called me Mr. Louisell?

A. What?

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[2] Defendant was an enormous man who at the time this remark was made weighed over 400 pounds.

Q. When you called me Mr. Louisell?

A. *YOU'RE NO DIFFERENT THAN MR. LOUISELL.*

Q. All right. Did you or did you not deliberately mis-call me?

A. *NOT DELIBERATELY. I CONSIDER YOU AS LOUISELL, ANYWAY.*

Q. I see. Well, I consider that's a compliment, for which I thank you.

A. *I DON'T CONSIDER IT A COMPLIMENT, SIR.*

Q. I know you don't. Now, sir, was Mr. Kilbee present last week, last Friday, when you called Mr. Barbara a big fat pig?

A. After he — I don't know if he was there. I presume he was there.

Q. Who were your body guards, at tax payers' expense, last week?

A. I wouldn't call them body guards, sir.

Q. What would you call them?

A. *I would call them law enforcement officers that are out to protect me from THESE PEOPLE.*

Q. All right, now, we'll use your language, Mr. Lazaros, we'll play the game according to your rules—

A. *YOU KNOW MY RULES, YOU'VE BEEN LIVING WITH MY KIND OF PEOPLE ALL YOUR LIFE, SO YOU SHOULD KNOW."* (emphasis supplied)

* * * * *

"Q. All right. Isn't it true that you've made other accusations against Mr. Barbara, other than the accusation here made by your wife?

A. What do you mean by that? Will you explain to me?

Q. Yes, I'll be happy to. Isn't it true that you have made a statement or statements to certain law enforcement agencies that at the Kingsley Inn, on or about December the 17th of 1967, Mr. Barbara paid a bribe, not only to certain Internal Revenue

agents, but also to Mayor Cavanagh of the City of Detroit?

A. Let me say this to you, while [sic] you want to know, Mr. Barris, Mr. Barbara, at that time he delivered the money, *REPRESENTING THE MAFIA, TO GIVE*—(emphasis supplied)

Mr. Barris: All right, your Honor, I move for a mistrial.

A. You asked me.

Mr. Barris: I didn't ask for that at all your Honor. I want to excuse the jury.

The Court: Escort the jury to the juryroom.

(Jury leaves the courtroom)

The Court: The record may show the jury is not in the courtroom.

Mr. Barris: Your Honor, the question I asked him could have been answered yes, no, or I don't remember. Here, Mr. Lazaros, for obvious reasons, injected the Mafia. Here, again, it isn't Mr. Bain's fault, he can't control this man and I don't think anybody else can.

The Court: Now, in response to one of your questions in chambers, I asked counsel to warn all witnesses not to use that term unless it was directly asked. Did you so indicate?

Mr. Bain: I certainly did.

Mr. Barris: I think this is a cool, calculated effort on the part of this man, who will stop at nothing to further prejudice Mr. Barbara. He's so smart, he's now done the very thing he didn't want to occur. But in any event, I think this is irreparable. It's something that was volunteered, and I don't know where anything else, other than a mistrial, could cure this thing. And it's only—we've only been in this trial a day. It isn't like we've spent three weeks.

The Court: Would you read the question and answer back?

(Reporter reads back the question and answer)

Mr. Bain: Now, if I might respond, as your Honor well knows, in chambers I was directed to

instruct Mr. Lazaros and his wife not to use the word Mafia. I did this in the witness room in the presence of Detective Aird and others. But I think Mr. Barris has purposely gone into the area. He's asked him regarding the allegation that Joe Barbara made certain pay-offs which, quite frankly, I knew nothing about prior to today. And if this allegation was made, if the question had not been answered here by Mr. Lazaros, I think, certainly, after he had gone into it, then I would have a right to ask, on re-direct, on whose behalf this money was paid. And I think, for that reason, that your Honor should not declare a mistrial. It may be inadvertent. He has said it at this time. I think, certainly, on re-direct, after we go into this area, I would have a right to ask on whose behalf the money was paid.

Mr. Barris: Well, your Honor, I'm sure it wasn't inadvertent. No more inadvertent than when he called me Mr. Louisell. This is a cool, calculated effort, by, that man—I don't mean Mr. Bain, I wouldn't saddle Mr. Bain with this man in a million years—a cool, calculated effort to prejudice this man in the eyes of the jury. It wasn't called for at all, by an answer. All he had to do is say 'yes,' 'no', or 'I don't remember'. He didn't have to come up with the word Mafia. In the first place, if he made such an allegation, it would be in connection with certain individuals, not with a group, but that's neither here nor there. I think it's as clear as my rather large proboscis that this man started out rather deliberately to inject that into the record. I'm not ever sure he'd deny it if you asked him. This man is bold enough to have done it deliberately. I think he did it deliberately.

The Court: Anything further?

Mr. Bain: Nothing further.

The Court: I'm going to take the motion under advisement. Proceed with the trial. And I caution the witness, do not mention that word again unless you are specifically asked a question which in-

volves the necessity of so answering. Do you understand?

A. Yes, your Honor.

The Court: All right. Return the jury. I'll take the motion under advisement.

(Jury returns to the courtroom)

The Court: The last answer to the last question is stricken, and the jury is instructed to disregard it. You may proceed."[3] (emphasis supplied)

• • • • •

"Q. Now, sir, do you remember testifying under oath on November 27, 1968, in a Judgment Creditors' proceeding, in which the questioner or interrogator was Mr. Harry Warren, and your attorney was James F. Finn, and the deposition commenced at quarter to 12:00 on that date, at your home in the City of Detroit?

A. I never had depositions with Mr. Finn representing me at my house.

Q. Is that right?

A. I don't remember anyway.

Q. Uh-huh. All right, now I want to ask you if you remember these questions being put to you by Mr. Warren, and Mr. Finn being right there—

Mr. Bain: I'm going to object, your Honor. I think we're now past that point—he testified he doesn't remember, he's cut off.

The Court: This is cross-examination, he may inquire to refresh his recollection, if he can.

Q. Referring to page 30—

A. First of all, Mr. Barris, let me ask you a question.

Q. Well, I didn't know you were running this court, Mr. Lazaros.

A. And I didn't know that you were running this court, Mr. Louisell.

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[3] The Court, of course, subsequently denied the Motion for a Mistrial.

Q. You called me Mr. Louisell again, is that right?

A. *YES, I ALWAYS CALL YOU MR. LOUISELL.*

Q. You did that deliberately, you know what my name is.

A. *YOU LOOK LIKE HIM, YOU ACT LIKE HIM, YOU REPRESENT THE SAME PEOPLE, AND YOU BELONG TO THOSE PEOPLE.*

Q. Are you through now?

A. Yes, I am.

Q. Do you have anything else to say?

A. No, sir." (emphasis supplied)

• • • • •

"Q. Did you make this answer under oath?

A. Look, we're here on extortion, we're not here on a bill that's already been paid, Mr. Barris. Let's get to the facts of this case.

Q. We're here to test your credibility.

A. *MY CREDIBILITY IS BETTER THAN YOURS, AND BETTER THAN THAT THING THERE."* (emphasis supplied)

• • • • •

"Q. Well, isn't it true, sir, that the Englander Furniture Company was literally taking your furniture out of your home?

A. Not my furniture, sir, Dalesford Farms, which is a corporation that I was General Manager at. Now, what has that to do with the extortion and the rape?

Q. You don't deny—

A. And destroying a child, what has that to do?

Q. Do you deny—

A. *WHY DON'T YOU ACT LIKE AN ATTORNEY INSTEAD OF A MEMBER OF US?*

Q. What was that?

The Court: Proceed.

Q. All right.

A. My whole family's been destroyed, Mr. Barris.

Q. Now, you say you've been telling the truth to the police officers for the last nine months?

A. *YES, I HAVE. AND I WILL CONTIUNE, AS LONG AS THEY LET ME STAY ALIVE, I WILL CONTINUE.*

Mr. Barris: Your Honor, I'm going to object—

The Court: That answer will be stricken. Proceed by question and answer.

Mr. Barris: I have a matter to take up with the Court at the first recess in relation to that unresponsive answer.

The Court: That answer is stricken, and the jury instructed to disregard it.

Q. Now, Mr. Lazaros, you know a gentleman by the name of Alex Phillos?

A. You asked me that yesterday. I said to you yes.

Q. All right, is it not true that you, within this last same nine months when you claim you've been telling the truth, counseled and advised Mr. Phillos to lie concerning a bribe?

A. That's a rotten lie on your behalf, Mr. Barris, and I will prove that in documents.

Q. All right, let me ask you this, isn't it true that you, on one occasion, told Mr. Phillos that unless he implicated now Judge Bronson, in a bribery attempt, that you would take him to the I.R.S.?

A. *THAT'S A ROTTEN LIE, MR. BARRIS. MR. PHILLOS IS UNDER THREATS RIGHT NOW FROM THESE PEOPLE, AND WE HAVE PROOFS TO THAT.*

Mr. Barris: Your Honor, I'm going to object to that.

A. You object to that?

The Court: Proceed by question and answer.

Mr. Barris. I am, your Honor. He doesn't respond.

A. I'm responding.

The Court: Just answer the question." (Emphasis supplied)

* * * * *

"Q. Mr. Lazaros, you and your wife were separated on occasion during your marriage, weren't you?

A. That's a lie.

Q. Absolute lie?

A. She filed for divorce, but we were never separated.

Q. She's petrified of you, isn't she? She's afraid of you?

A. Let me tell you something, Mr. Barris, you're going to ask me these questions like a gentleman. *LOOK, I'M FIGHTING FOR MY LIFE,* and I don't care what you say to me, but I love my wife and I love my kid.

Q. You've beat her up on occasion?

A. You're a liar. Whoever tells you that—*MY LIFE IS IN DANGER TODAY.* And I love my wife.

The Court: Proceed by question and answer.

Mr. Barris: I do, your Honor. I can't stop this man, nobody has been able to.

A. You're insulting me. I love my wife and I love my retarded kid, that he put back three years.

The Court: Listen to the questions, answer the questions and proceed from there.

A. I'm sorry, your Honor.

Q. In other words, anybody who said you beat up your wife, or said you struck your wife is a liar?

A. I never touched my wife.

Q. In other words, whoever said that is a liar, is that right?

A. That's right. I hope your family has to go through the same thing my kid has to go through.

Q. You've lived how many years with your wife?

A. 11 years.

Q. I'm sure you recognize her handwriting then, do you not?

A. *YES, BUT I KNOW YOU KIND OF PEOPLE, YOU'RE VERY GOOD EXPERTS ON THAT.*

Q. All right.

A. *I LIVE WITH YOU PEOPLE.*

Q. You don't live with me.

A. *YOU REPRESENTED ME. I KNOW YOUR KIND.*

Mr. Barris: Well, your Honor, I don't think I have to take this kind of abuse.

A. That's not my wife's signature.

Q. You deny that's your wife's signature?

A. It doesn't look like my wife's signature.

Q. You look at it again, you're under oath.

A. I looked at it once, I know I'm under oath. *I DON'T HAVE TO TAKE YOUR ORDERS. I'M NOT IN GREEKTOWN HERE.*" (emphasis supplied)

Cross Examination of Delores Lazaros by Mr. Barris:

"Q. You'll do practically anything to keep your husband from going back to jail, won't you?

A. You were just trying to imply I didn't care for my husband and I filed for divorce. Why would I do anything for somebody that I didn't love or that I wanted to go back to jail, sir? Why would I do anything for a person that you described that I don't love, who I do love?

Q. Is this the man whom you, under oath, accused of attempting to kill you on occasion?

A. I never said, under oath, that my husband tried to kill me.

Q. All right.

A. I told you I don't know if I signed those papers after they were written up or before they were written up. I was only in the attorney's office probably an hour.

Q. Are you suggesting this attorney gave you something to sign in blank and you signed in blank, is that what you're attributing to Mr. Heffner?

A. I didn't say anything bad about Mr. Heffner. I know attorneys do that, and so do you.

Q. I do, aye?

A. Yes, yes, you do. Because if I remember correctly, he told me he didn't even have grounds for divorce. My husband was in a lot of trouble then. I wasn't as brave as I am now.

Q. You wanted to abandom him in this time of trouble?

A. I didn't, did I? I'm here today. I didn't abandon him, did I? You're trying to say I didn't care for him. *DO YOU THINK ANYBODY WOULD SUBJECT HIMSELF TO WHAT I'M GOING THROUGH NOW, TO LIVE A LIFE LIKE VALLACHI DOES?*[4]

Mr. Barris: Well, I'm not going to let that pass.

A. Why?

The Court: Escort the jury into the juryroom.

(Jury leaves the courtroom)

The Court: The record may show the jury is not in the courtroom.

Mr. Barris: Well, your Honor, we now have another reference to anybody who is at all knowledgeable, suggesting that somewhere, involved in this case, is the Mafia. The name of Vallachi was now used by this witness, a man who reputedly has given testimony against individuals who supposedly were alleged to be involved in the Mafia. I don't know how many of these volunteered statements can come into this court without there being a recognition that this man can never get a fair trial under these circumstances.

I think that's devastating. Not as devastating as the Mafia remark, but still when you pile one up against the other, it doesn't leave much to the imagination of anyone.

The Court: Well, the motion will be denied. We certainly have to proceed in a little different manner from here on, with both of these witnesses." emphasis supplied)

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[4] The reference of course, is to Joseph Vallachi, the notorious so-called "Mafia" informer.

Re-direct examination of Delores Lazaros by Mr. Bain:

"Q. Mrs. Lazaros, the State Police Officers who stayed at your home, are they in uniform or not?

A. Yes, they are. And the cars are cars that have police markings on them.

Q. And how many are there?

A. There's one in front, there's one on the side of the house, and—well, not on the side, it's a circular drive, and you can see them as you walk in the front door.

Q. Just tell the jury how many State Policemen are there?

A. Sometimes there's three cars, and sometimes there's two cars. And they check everyone who comes in.

Mr. Bain: I have no further questions.

The Court: You may cross-examine.

Mr. Barris: Well, if your Honor will take judicial notice of the files of this cause, the Examination of this matter began November the 8th, 1968, I would have no cross-examination.

The Court: Is that correct? I wasn't there.

Mr. Bain: I will stipulate to that, your Honor. That's the date of the Exam.

Mr. Barris: No questions.

The Court: You may step down, Mrs. Lazaros, watch your step, there's two steps down.

A. *WHY DO I HAVE TO STEP DOWN? CAN'T I TELL THIS COURT WHAT HAPPENED?*" (emphasis supplied)

It is quite apparent from the above-quoted testimony that the Court's cautionary instructions to the jury to disregard much of the prejudicial matters brought to the jurors' attention was an exercise in futility. While the word "Mafia" was used only once, the references to this so-called "underworld network" were repetitive and clear. To say that the jurors in this case could render unto the defendant a fair trial after he had been linked to the Mafia requires men of

good conscience and intellectual honesty to play the role of a judicial ostrich.

The case of *United States v. Rubino,* 431 F. 2d 284, decided by this Court should be of some interest. Defendant Rubino was charged with various violations of the Internal Revenue Code. During the course of the trial, a Detroit News article appeared on the front page, which included the following reference to the Defendant Rubino:

> "Matthew (Mike the Enforcer) Rubino, reputed Mafia leader, has since gone to trial for income tax evasion in the Federal Court with Louisell as his lawyer. The trial is now in its second month."

Of the 14 jurors only one was shown to have definitely read the entire article, including the four-line paragraph alleged to have been prejudicial. The Sixth Circuit held that under these circumstances it could not find reversible error and placed much significance on the fact that "defense counsel could have requested that this juror be replaced by an alternate, but failed to do so". The Government on oral argument conceded in the Rubino case that had this information been presented during the trial, a mistrial would have certainly been in order.

What is of special significance to the instant case is the following language from Judge Peck's dissent:

> "The determination as to whether the material under attack is prejudicial in the present context may best be resolved on the basis of whether its admission into evidence over objection would constitute grounds for a mistrial or for the subsequent vacation or reversal of a judgment entered on a verdict. Thus whether the receipt in evidence of page 1 of The Detroit News of January 21, 1969, would constitute such prejudicial error becomes pertinent. No organization (if that be an acceptable term) today strikes such terror to the American

heart as does the Mafia. A current best seller in the field of American fiction depicts its evils, as do both fictional and allegedly factual presentations by national media. Its corruptions are constantly chronicled and its acrocities in every area of unsavory activity are endlessly portrayed in vivid detail. We daily hear and read how the ill-gotten gains of its narcotic traffc, prostitution rings, usury rackets and murders by contract are invested in staggering sums in legitimate enterprises of every nature, frequently placing control in the hands of shadowy arch criminals. These observations are not based on facts that have not come into this record through admissible evidence safeguarded by confrontation and cross-examination of a witness testifying under oath, but neither did the appellant's characterization as 'Matthew (Mike the Enforcer) Rubino, reputed Mafia leader', get into the record that way. *I AM OF THE VIEW THAT HAD THIS CLEARLY INADMISSIBLE STATEMENT BEEN RECEIVED BY THE JURY IN THE COURTROOM, NO AMOUNT OF JUDICIAL INSTRUCTION COULD HAVE ELIMATED ITS PREJUDICIAL EFFECT.* Similarly, I must conclude that the acquisition of prejudicial material outside the courtroom by at least two members of the jury in the present case requires reversal. * * * " (emphasis supplied)

In the instant case we need not trouble ourselves with determining, "how many rotten apples does it take to spoil the barrel" (See Judge Peck's dissent). The reason for that is the obvious—every member of the jury who decided Joseph Barbara, Jr.'s fate was exposed to the highly inflammatory and prejudicial Mafia remark. Every juror was further exposed to the repetitive and unmistakable references to that underworld organization.

In *United States v. DeDominicis*, 332 F.2d 207 (C.A. 2 (1964)), the Court was faced with the following situation: The defendant was convicted of buying unstamped and

illegally imported heroin. During the course of the trial a Government witness by the name of Morton testified on re-direct examination that a man by the name of Cippola, a Canadian supplier of the illegal drugs, had referred to the defendant in a conversation. Cippola was not available to testify or to be cross examined. The Court attempted to cure the error by instructing the jury to disregard the statement. The Court of Appeals found such an instruction insufficient to protect the defendant's rights. The Court held in substance that this attempt to show guilt by association was so prejudicial that the instruction was unlikely to remove the prejudice indelibly marked on the jurors' minds.

In *United States v. Sansone,* 206 F.2d 86 [C.A. 2 (1953)], the defendant was convicted of conspiring to import and sell heroin in violation of federal law. During the course of the trial a narcotics agent by the name of Guiliani testified that he had had a conversation with a man named Giannini, who had been named as a co-conspirator in the defendant's Indictment but who had not been arrested. The federal agent also stated that Giannini had told him that the defendant was the courier for a mob of traffickers in narcotics. The Court eventually instructed the jury that they were to disregard such testimony. The Court of Appeals, nonetheless, reversed the conviction holding as follows:

> "Whether cautionary instructions to the jury to disregard prejudicial evidence erroneously admitted will cure the error depends, of course, upon the nature of it and the circumstances in each instance. When it cannot with reasonable certainty be shown that the harm has been undone a reversal is required. See Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557. We think so much harm was done that it isn't reasonable to

conclude that it was eradicated in the ways attempted for that seems to be asking of the laymen composing the jury something which was well nigh impossible. Cf. Delaney v. United States, 1 Cir., 199 F.2d 107.

"Could we be sure that the jury was not substantially influenced adversely to the appellant, the judgment might be upheld—But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, a conviction cannot stand." Kotteakos v. United States, *supra,* 328 U.S. at page 765, 66 S. Ct. at page 1248.

"Judgment reversed and cause remanded." (at page 88)

In *Gregory v. United States,* 369 F.2d 185 [CADC (1966)], the defendant had been charged with a five-count indictment including first-degree murder, second-degree murder, two robberies and an assault with a dangerous weapon. He was convicted on all counts. The facts of the *Gregory* case insofar as they are applicable to the instant one may best be elucidated by a quotation from that case:

"A prosecution witness, Police Officer Johnson, on two occasions volunteered testimony concerning an offense, for which appellant was under indictment in another case, totally unrelated to the crimes for which appellant was on trial. The police officer was called in rebuttal by the Government to testify that three weeks before the events in suit appellant was clean shaven, several of appellant's

witnesses, including himself and his barber, having testified that for some months prior to the robbery, appellant had been wearing a goatee. The prosecutor had previously assurred the court and defense counsel that the Government would not develop the evidence that at the time the officer saw appellant clean shaven, appellant had assaulted him with a gun.

"On direct examination of the police officer, no reference to the assault with the gun was made. On cross-examination, however, when the officer began a non-responsive answer to a question, defense counsel objected, fearing that he might voluntarily introduce the gun incident. The Trial Court overruled the objection and ordered the witness to finish his answer. In finishing his answer, later held non-responsive by the court, the officer testified to the assault with a gun. Whereupon defense counsel moved for a mistrial. The motion was denied with the simple instruction that the jury should disregard the answer. The motion for the mistrial and the instruction to the jury to disregard the witness' testimony with reference to the gun incident were made in the presence of the officer on the witness stand. Five questions later, in the same cross-examination, the officer again volunteered the testimony that appellant had assaulted him with a gun. Again there was a motion for a mistrial, which was again denied with a perfunctory instruction to the jury to disregard the testimony." (at pp. 189, 190)

The Court of Appeals for the District of Columbia condemned the voluntary statements of Officer Johnson and held that the cautionary instructions of the Court were insufficient to remedy the situation:

"With reference to the effectiveness of the court's cautionary instruction to the jury to disregard the improper testimony, particularly the in-

structions given in this case, it may be useful to quote again from Mr. Justice Jackson concurring, in Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949): 'The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.'[2] The volunteering by police officers of inadmissible testimony prejudicial to the defendant has been condemned time and again by both state and federal courts. For example, in Wright v. State, Okl. Cr. App. 325 P.2d 1089, 1093 (1958), where a law enforcement officer injected this type of prejudicial testimony, not twice as here, but only once, the court states: 'This type of testimony has often been referred to as "evidential harpoon" that has been wilfully jabbed into the defendant and then jerked out by an admonition to the jury not to consider the same. This court has never condoned, but often criticized a witness being intoxicated with eagerness in an all-out effort to obtain a conviction. * * * Officers must be aware that an overzealous attitude is, in most instances, detrimental to the prosecution and often results in a retrial of the case at considerable expense to the State.'" (at p. 90)

In *Nalls v. United States*, 240 F.2d 707 [C.A. 5 (1957)], the Court in reversing a narcotics conviction commented as follows at page 710:

"An unresponsive statement was volunteered by City Policeman Scott for which the Government was not responsible. When asked what he did when he first saw defendant, the officer replied: 'Our Department carried a pick-up on him on a warrant

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[2] The Supreme Court of the United States of late has come to the realization that Justice Jackson spoke the truth in the *Krulewitch* case. *Bruton v. United States*, 88 S.Ct. 1620, *Jackson v. Denno*, 84 S. Ct. 1774.

held by the sheriff's office.' The Court, upon objection and request, stated: 'I believe at this stage of the proceeding I will sustain the objection and instruct the jury not to consider that remark.' A mistrial was promptly asked and refused. We think that this statement was calculated to influence the thinking of the jury and was likely to induce prejudice, just as was the statement made by the attorney in closing the Government's case. It is difficult to conclude that such occurrences were not likely to have a bearing on the jury's verdict. * * * "

In *Perecinsky v. Commonwealth (Ky.)*, 340 S.W. 2d 233, the defendant had been convicted of grand larceny. Prior to trial a ruling was made prohibiting the Commonwealth from showing certain evidence garnered as the fruit of an unlawful search. Nevertheless an overzealous police officer injected by way of testimony facts showing that which was prohibited by the court's ruling. The court held in substance that the witness' testimony was actually contemptuous and had effectively deprived the defendant of a fair trial.

The above-mentioned cases are among a plethora of federal and states cases condemning the practice of permitting witnesses to inject extraneous and prejudicial matters into the trial of a criminal case and then permitting the state to hide behind a patently ineffective cautionary instruction.[6]

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[6] See also *Wright v. State* (Okl), 325 Pac.2d 1089 (1958); *Riddle v. State (Okl)*, 373 Pac.2d 832 (1962); *Riddle v. State (Okl)*, 374 Pac. 2d 651 (1962); *State v. Taylor*, (Wash), 381 Pac.2d 617 (1962); *Brown v. United States*, 202 F.2d 474 [C.A. 5 (1953)]. Of further interest is the following dicta from *People v. Trinchillo*, 153 N.Y. Supp.2d 685 (1956): "Further, we feel constrained to comment on the testimony and attitude of the witness, Detective Tracy. His failure to answer questions responsively and his repeated attempts in answering questions to inject extraneous matters, although admonished several times by the trial judge, tended to be prejudicial to a fair and just trial."

Further, of great concern not only to the defendant, but to members of the bar and bench alike, is the witness Peter Lazaros' verbal attacks on counsel for the defendant.[7] No purpose will be served by argument delineating the venom-filled accusations leveled at defense counsel. Suffice it to say, that as one reads this record he is constrained to wonderment as to why the Trial Judge permitted these attacks on counsel to go unpunished. Is not the following language contained in *People v. Brocato,* 17 Mich. App. 277 (1969), applicable to this situation even though the conduct here complained of emanated from a witness rather than from the prosecuting attorney?:

> "We feel compelled to note, also, that the trial court failed to discharge his statutory duty to control all proceedings during trial and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved. C.A. 1948, §768.29 (Stat. Ann 1954 Rev. §28.1052). Great care should be exercised by the trial court as well as the prosecuting attorney to insure that no statement be made in the presence of the jury which would jeopardize a defendant's right to a fair trial. People v. De Lano (1947), 318 Mich. 557. The trial court is not a mere figurehead. He is charged with directing important public business. To this end he should not hesitate to control the scope of the evidence when, as here, immaterial or prejudicial matters are being introduced for a purpose clearly extraneous to the ascertainment of innocence or

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[7] See *United States v. Guglielmini* 384 F.2d 602 [C.A. 2 (1967)], wherein the Court of Appeals reversed because the total effect of errors consisting of the trial judge's statements serving to demean defense counsel and casting unfavorable light on defense, mention of irrelevant, prejudicial evidence, played a part in casting a serious doubt on the fairness of the trial.

guilt. He must not hesitate to keep the conduct of the attorneys within the boundaries of legitimate argument and to promptly check them when they exceed it.

"The rulings of the court are to be followed and when they are not the court should exercise its power of contempt or at least reprimand the offending person in the jury's presence. Most of the trial court's rulings on the point we have mentioned were eminently correct. The error occurred because the prosecution was allowed to ignore them with impunity" (at pp. 304, 305).

It has been written that "The quality of a nation's civilization can be largely measured by the methods it uses in the enforment of its criminal law." Shaefer, *Federalism and State Criminal Procedures,* 70 Harv. L. Rev. 1, 26 (1956). If this nation's civilization is measured by the methods used to convict petitioner, then we have indeed returned to the concept of trial by ordeal.

7. ADDENDUM

The thesis advanced by the State throughout all appellate proceedings and on collateral review in the Federal Courts, has been that the interjection of the prejudicial extraneous matter of the witnesses were the product of the conspiratorial efforts of the defense lawyers. The Federal Court of Appeals seemed to agree with this thesis in determining that the unresponsive answers were provoked by defense counsel. The Court of Appeals felt that "The trial strategy adopted by the defense was inherently provocative."

The question of whether or not defense counsel deliberately engendered the answers complained of, or whether

there was a conscious effort on the part of the two witnesses to deprive the defendant of a fair trial and create a circus atmosphere was hotly debated at every stage of the proceedings. For all of those who have any knowledge of the recent Lazaros perjury trial hereinbefore referred to, the question is no longer open to debate. The Lazaros perjury trial was tainted and earmarked by the same prejudicial conduct by the same witnesses.[8]

Counsel in the Lazaros perjury case were two of the country's most well thought of attorneys (the special prosecutor was Mr. Howard O'Leary, counsel to the United States Senate Anti-Trust Committee and Administrative assistant to Senator Philip Hart. Defense counsel was F. Lee Bailey, an outstanding member of the Bar of the State of Massachusetts.[9])

The bizarre federal trial of Peter Lazaros was marked by the following events: Mrs. Lazaros, as she did in State Court, was subject to outbursts of crying which precipitated her husband's lawyer to stand up in open court and demand that they "get her out of here." Her outbursts lead to the court not only banning her from the courtroom but from the building. After being ordered from the building, Mrs. Lazaros regained access to the building and returned to the 7th floor (in which the trial was being held and where the jurors were being housed during their deliberations) and

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[8] Counsel for petitioner here is unable with the record as it is now postured to verify this with anything other than his own statements.

However, counsel is attempting to get copies of relative portions of that trial transcript and is further attempting to get affidavits of some of those who observed the trial firsthand.

[9] Bailey himself has said on record in the Circuit Court for the County of Oakland, State of Michigan, that "Mr. Lazaros very seldom tells the truth."

made a supposed attempt at suicide by standing on the ledge next to the window. She was again removed from the building. Mrs. Lazaros then went onto Lafayette street adjacent to the Courthouse where it was reported that she laid down in the middle of the street with some sort of attack, but after being taken to the hospital, she was released without treatment. Her testimony included volunteered derogatory and ugly references to the family of the United States Attorney. Mr. Lazaros apparently feigned a diabetic attack in the courthouse. Mr. Lazaros further made accusations against the bailiff in charge of the jury to the extent that evidentiary hearings had to be held close to midnight on one of the trial days. As one government attorney put it, "The Lazaros' are a one family crime wave."

Petitioner's state court trial was the first in a sequence of events that has to qualify as among the most bizarre in the history of Michigan jurisprudence. The original allegations which lead to petitioner's arrest in this case precipitated national interest in Lazaros. Peter Lazaros was looked on at this early stage as a new "Vallachi." Lazaros was a self-styled former Mafia leader who was leading law enforcement officials to believe that he had vast sources of information about the mysterious underworld network. Press conferences were held by Lazaros who was being viewed at that point as something of a local hero. It was during the apex of Lazaros' popularity that Joseph Barbara went to trial. Subsequent to the petitioner's trial, the hunter became the hunted. Lazaros has been indicted by state and Federal grand juries on wide ranging charges of perjury. The Federal indictment resulted in a conviction on all twelve (12) counts. His own lawyer has made a public statement that Lazaros "seldom tells the truth", as hereinbefore noted. Every right-thinking person who has be-

come acquainted in some way with Mr. and Mrs. Lazaros will say openly that they are totally unworthy of belief. Unfortunately, those facts were not known during petitioner's state court trial, and Joseph Barbara faces seven to twenty years of imprisonment based on the uncorroborated testimony of people who now are known to have no credibility whatsoever.

8. CONCLUSION

For the reasons aforementioned, petitioner does pray that a petition for certiorari for the Sixth Circuit shall be granted or in the alternative that this cause shall be remanded to the District Court with instructions that an evidentiary hearing be conducted to determine whether or not perjury was committed at petitioner's state court trial.

Respectfully submitted,

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Attorney for Petitioner
NEIL H. FINK
Of Counsel

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS[a]

(Division 2)

The People of the State of Michigan,
Plaintiff-Appellee,
v.
Joseph Barbara, Jr.,
Defendant-Appellant.
No. 8150

(April 29, 1970)

Before: R. B. Burns, P. J., Fitzgerald and Van Domelen, JJ.

Fitzgerald, J.

Joseph Barbara, Jr., the defendant in the instant case, was charged with the extortion of Mrs. Peter (Delores) Lazaros contrary to CL 1948, § 750.213 (Stat Ann § 28.410). Defendant stood mute to the charge and a plea of not guilty was entered on his behalf. Following several adjournments, the trial commenced on August 1, 1969. Objection was raised by the defense to holding the trial at that time since the complaining witness was pregnant. The matter was submitted to a jury on August 12, 1969, which found the defendant guilty of the crime with which he was charged. On September 19, 1969, defendant was sentenced to serve 7 to 20 years in prison.

During the course of the trial, Mrs. Lazaros testified that Joseph Barbara, Jr., came to her home while her husband was in prison and, through the use of threats upon the lives of members of her family, was successful in efforts to rape

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[a] The trial court did not deliver an opinion.

and extort money from her. It was alleged that defendant informed Mrs. Lazaros that if she did not cooperate, he would have her husband killed in prison. Complainant charged that similar threats were made on her son's life.

The complainant feared for her husband's life and informed no one of these events until some six months later when her husband returned from prison. A complaint was then filed with the State Police which resulted in defendant's arrest.

Testimony was also elicited from Nicholas Lazaros, father of Peter Lazaros, to the effect that defendant had come to the Lazaros home while his son and daugher-in-law were at the police station. Threats were made and defendant pushed the elder Lazaros to the ground. Evidence was also introduced that Barbara had agreed to help Peter Lazaros on his appeal from a previous criminal conviction and that Lazaros was angry because things had not gone as well as anticipated.

Following the prosecution's rebuttal, the name of Tischia Lazaros, mother of Peter Lazaros, was reindorsed upon the information. Her name was originally on the information, but it was removed during trial. She corroborated the testimony previously given by her husband, Nicholas Lazaros.

Several issues are raised on this appeal; the first concerns the question of whether the continuous injection by witnesses Peter and Delores Lazaros of extraneous matters in the presence of the jury deprived defendant of his right to a fair trial by an impartial jury. The allegedly prejudicial matters concern references made which imply that defendant and his attorneys were connected with the "Mafia", thus inferring a guilt by association. Defendant argues that in light of the remarks made, the judge's in-

structions to the jury, striking all references to the above subject, were not sufficient because of the inflammatory nature of these utterances.

The people argue that defendant's attorneys deliberately phrased questions which were calculated to bring out references to the "Mafia", thus inviting error for purposes of having a mistrial declared.

In *People v. Wolke* (1968), 10 Mich App 583, this Court addressed itself to questionable evidence injected into a trial. The Court discussed the question of when objectionable evidence will be held to so prejudice a jury that a new trial must be granted. In analyzing the applicable authorities, it was found that two standards exist; namely, that once a prejudicial remarks is made, the "ink spot" may not be blotted from the minds of the jury by express instructions. On the other hand, recognition was also given to a line of cases which presumed that a jury considers only the testimony permitted by a court to stand. This Court held that the choice of which standard to apply ultimately rests upon the degree of prejudice generated by the objectionable evidnce. Only if the testimony is inherently prejudicial or inflammatory will there be an "ink spot" on the minds of the jurors which cannot be erased.

In the case at bar, we are dealing with unresponsive, irrelevant, and spontaneous answers volunteered by two witnesses. In 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 600, it is stated:

> "Error cannot be predicated upon the fact that a witness gives an improper or irrelevant answer where the question was a proper one and neither the court nor counsel was at fault. Improper testimony offered by a witness and promptly struck out by the court on objection is not reversible error. * * * A witness cannot put error into a case by an unauthorized remark,

neither called out by a question nor sanctioned by the judge; and if what he says or does improperly is likely to do much mischief, it is presumed that the judge will apply the proper corrective measures in his instructions if requested to do so."

A review of the problem with which we are faced leads to the inescapable conclusion that if error could be easily predicated on the improper utterances of a witness, it would be most difficult ever to conduct a proper trial. *People v. Droste* (1910), 160 Mich 66.

Unresponsive answers, irrelevant in nature alone, are not sufficient to cause reversible error. The instructions to disregard the utterances made were quite sufficient to instruct the jury on those matters not properly before them and cured the possibility of prejudice to defendant.

The next question discussed concerns an alleged error in permitting the prosecution to call Mrs. Tischia Lazaros in rebuttal to help prove its case-in chief. Defendant asserts that such a last minute action, after the defense had rested its case in rebuttal, unfairly prejudiced defendant's rights. The people argue that the question of reopening the proofs is solely within the court's discretion and, further, that the testimony only related to matters which they had previously introduced.

In support of this assignment of error, defendant relies on our previous decision in *People v. Sacharczyk* (1969), 16 Mich App 710. However, the facts are readily distinguished from those in the case at bar. In *Sacharczyk*, it was held that the allowance of rebuttal evidence was improper because the witness there introduced had never been indorsed on the information, no explanation of failure to indorse was given, and the testimony itself was improper as it tended to prove surrounding circumstances of the

crime. A review of the record discloses that Tischia Lazaros had been indorsed on the information and the testimony elicited was rebuttal of defendant's earlier testimony. Furthermore, the rule in Michigan places the question of whether to allow rebuttal evidence within the discretionary powers of the trial judge, and this will not be disturbed unless clearly abused. *People v. Chimovitz* (1927), 237 Mich. 247; *People v. Delano* (1947), 318 Mich 557. The testimony in question does not add anything new, but merely corroborates the earlier testimony of Nicholas Lazaros. The record also evidences the fact that the trial judge instructed members of the jury not to give undue weight to Mrs. Tischia Lazaros' testimony due to her position in the list of witnesses. Explanation was also given as to why the particular witness had not testified earlier and assurances were made by the prosecution that the situation had been corrected.

In *People v. Leonard E. Smith* (1968), 15 Mich App 173, this Court, citing *People v. Cox* (1888), 70 Mich 247, ruled on the reception of rebuttal evidence which should have been brought out on direct examination. It was held therein that the reception of testimony on rebuttal which should have been offered on direct examination is within the discretion of the trial court, unless such discretion is clearly abused. It was further held that where the testimony in question merely expands or supports previously admitted testimony, it is not prejudicial. Hence, we find the decision of the trial court in admitting the woman's testimony to be reasonable and for the reasons delineated above, reversible error was not committed in the particular instance.

The next issue to be considered is whether the trial court erred in not admitting the testimony of two witnesses to contradict the testimony of Peter and Delores Lazaros. Defendant argues that one of these witnesses would have

testified to the effect that Mrs. Lazaros had stated that her husband had threatened to kill her and this would have been demonstrative of the fact that she was testifying out of fear of her husband. Defendant further argues that the testimony of the other witness would have lent support to his theory that Lazaros was attempting to snare defendant in a network of lies. The people rely on the trial court's reasoning that the testimony of the two witnesses only attempts to impeach on a collateral matter and does not show any scheme or design or bias by the prosecution's witnesses in testifying as they did.

It is evident that the trial court was correct in its ruling since defendant has not substantiated his argument that the testimony of these witnesses would show the interest or bias of the complaining witness and her husband, and it appears merely to be an attempt at impeachment on a collateral matter. The reasons why Peter Lazaros might falsely testify about defendant were before the court as a result of other testimony and, in addition, the fact that Mrs. Lazaros had started divorce proceedings against her husband was brought before the jury on cross-examination. The trial court has wide discretion in this area as exemplified by *People v. MacCullough* (1937), 281 Mich 15, where the Court stated:

> "The discretion of the trial court upon the subject of cross-examination on collateral matters is not subject to review unless it is shown to have been grossly and oppressively abused. So far as the cross-examination of a witness relates either to facts at issue or relevant facts, it is a matter of right; but when its object is credibility of a witness, its method and duration are subject to the discretion of the trial judge and unless abused, its exercise is not the subject of review."

Therefore, this Court finds that the answer of a witness on cross-examination as to a merely collateral matter becomes binding upon the cross-examiner and may not be contradicted through introduction of further testimony of other witnesses regarding these collateral matters.

Last, defendant asserts that it was unduly prejudicial to his cause not to postpone the trial until the complainant had given birth to her child. He contends that having to cross-examine an obviously pregnant woman before the jury created sympathy among the jurors and denied him a fair trial. We cannot accept defendant's argument, for the law in Michigan is quite clear that a continuance is a matter of discretion with the trial court. The court had good reason for denying the continuance in that considerable delay had already surrounded the proceedings and some of the prosecution's witnesses wanted to leave the country. In *People v. O'Leary* (1967), 6 Mich App 115, this Court was faced with a similar situation where the complaining witness in an involuntary manslaughter case was pregnant and a continuance was denied by the trial court. This Court affirmed the decision, stating that such matters were discretionary and no abuse existed. In the instant case, we cannot find that the lower court abused its discretion in denying the continuance.

In each of the issues raised on this appeal, it seems eminently clear that the trial court's rulings were fair and based upon established law. The lower court must be upheld since, in light of CL 1948, § 769.26 (Stat Ann 1954 Rev § 28.1096), it does not "affirmatively appear" that there has been a "miscarriage of justice".

Affirmed.

APPENDIX B

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(Michigan Supreme Court No. 52,848)

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 16th day July in the year of our Lord one thousand nine hundred and seventy.

Present: The Honorable Thomas E. Brennan, Chief Justice, John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associates Justices.

On order of the Court (T. G. Kavanagh, J., dissenting), the application for leave to appeal is considered, and the same is hereby denied, for the reasons that defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 16th day of July in the year of our Lord one thousand nine hundred and seventy.

Harold Hoag,
Deputy Clerk.

(Seal)

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joseph Barbara, Jr., Petitioner, v. Perry Johnson, Warden, State Prison of Southern Michigan, Respondent.	Civil No. 35321

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

At a session of said court, held in the Federal Building in the City of Detroit, Michigan, on December 9, 1970.

Present: The Honorable Fred W. Kaess, United States District Judge.

Petitioner, who was convicted in the Oakland County Circuit Court and sentenced to the custody of the Michigan Department of Corrections for a term of not less than seven and not to exceed twenty years, for the crimes of rape and extortion, is presently incarcerated in the Southern Michigan State Prison at Jackson, Michigan. The instant petition for habeas corpus was filed on behalf of petitioner by retained counsel, who also represented petitioner in the state proceedings.

The record reveals that petitioner has exhausted his available State remedies.

Counsel for petitioner alleges that several unresponsive statements uttered by two prosecution witnesses in the

presence of the jury, during the course of petitioner's cross-examination, deprived petitioner of his constitutional right to a fair trial by an impartial jury. The objectionable remarks concern references that the petitioner and his attorneys were connected with the Mafia. The actual word "Mafia" was interjected into the trial proceedings on only one occasion, however, there was several alleged related references to "these people" and "your people" and "them".

The record further reflects that each time defense counsel objected to the extraneous remarks, the objectionable statements were stricken from the record, accompanied by cautionary instructions from the court directing the jury to neither grant credence to such testimony nor to consider such testimony as evidence against the petitioner.

In this present petition the court is asked to review admittedly objectionable testimony and to determine whether the trial court's cautionary instructions sufficiently purged such testimony of its prejudicial effect.

While there are a multitude of opinions concerning objectionable testimony and instructions to disregard, the rationale employed in determining whether the improperly admitted testimony was so highly prejudicial as to warrant a mistrial is as varying and different as the number of cases. There is, however, a prominent thread of guiding principle frequently woven into the fabric of cases of this nature which generally states that improper testimony is presumed to be cured by judicial instruction, except when the objectionable testimony is inherently prejudicial or inflammatory.

In attempting to calculate the amount of harm incurred by the petitioner from the objectionable statements, the reviewing court must make some analysis of the atmosphere and proceedings in the lower court. There cannot be a

more difficult task. In essence, the judge sitting in review is asked to make a subjective decision regarding the trial atmosphere based solely on the objective facts of the trial record. As both the petitioner and the respondent suggest in their supporting briefs, the "cold record" can never accurately reflect the circumstances surrounding the introduction of harmful testimony.

Nevertheless, the transcript does show that the trial, for the parties and witnesses, was an emotional affair involving extortion from and the rape of a man's wife by an alleged close friend of the husband, while the husband was in prison. In an emotional trial of this nature spontaneous, unresponsive, statements are extremely likely, if not imminent. The fact that a witness volunteers an improper or irrelevant answer should not become grounds for reversal, absent a showing that the unauthorized remark affected the substantial rights of the accused.

It is also obvious from the trial transcript that the judge and the attorneys were fully aware that parties involved in the trial had been widely publicized in the local newspapers as members of the Mafia. Apparently knowing of these reputations, the judge had the primary witnesses instructed not to mention the word "Mafia" unless directly asked a question which would require use of the word in their answer (Trial Transcript, p. 175). Despite the temperamental nature of the prosecution witnesses and the knowledge of their alleged association with the Mafia, the defense counsel on cross-examination proceeded to question these witnesses about certain incidents in which they, as members of the Mafia, had supposedly been involved. At times the repeated probing by defense counsel into these collateral matters resulted in heated exchanges between himself and the prosecution witnesses. Clearly, it is ar-

guable that, in light of this antagonistic cross-examination, the petitioner may have invited error and may be at least partially responsible for any prejudice that may have survived the instructions of the trial court.

There are on record many cases involving the objectionable and prejudicial remarks of prosecution witnesses, given in response to questions propounded by a government prosecutor. Frequently these cases require the declaration of a mistrial as the only remedy by which to insure that the defendant will receive a fair trial. In the case at bar we are not reviewing the conduct of an over-zealous government prosecutor or unauthorized remarks elicited by the government during direct examination of one of its own witnesses. Rather, the petitioner in this action is seeking the declaration of a mistrial because his cross-examination of the government's witnesses brought to the jury that which the court had purposely attempted to exclude.

The petitioner appears to be asking this court to conclude that the mere mention or suggestive association of an accused with the Mafia results in incurable prejudice and the automatic declaration of a mistrial. However, there appears to be no case authority directly in point to support such a position.[1] Moreover, to rule that the word "Mafia" is inherently prejudicial would mean that trial advocates, purposely or otherwise, could easily elicit a "Mafia" response during the examination of a witness and thereby automatically obtain a mistrial. Thus this court is loathe to accept the proposition that the word "Mafia" possesses the magical quality of ipso facto incurable prejudice when injected into trial testimony. For there looms in the back-

[1] However see under *States v. Rubino*, 431 F.2d 284 (6 Cir. 1970); and *United States v. Lazaros*, 425 F.2d 638 (9th Cir. 1970, at p. 641).

ground of such a proposition the distinct possibility that a remedy originally conceived as a sword of truth could become a weapon for injustice.

However, in the instant case there is far more than the mere reference to petitioner's alleged connections with the "Mafia".

In this case, prior to the witnesses taking the stand, the court specifically had them instructed as to the impropriety of such testimony. Further, the record reflects that in the wake of the court's sustaining a defense objection and cautioning the jury, the prosecution witness persisted with additional references to "these people", "your people", and "them", thus paying no heed to the court's ruling. Clearly this indicates more than a mere slip-of-the-tongue reference to the "Mafia". It is more than an emotional response resulting from intense cross-examination. And, most importantly, it is more than could be cured by *any* trial court's instructions to the jury.

It is always with great hesitation and only after most arduous deliberation that a reviewing court will reverse the discretionary rulings of a trial court—particularly in view of the fact that it is the trial judge who observes the atmosphere in the court room with the totality of circumstances which are incapable of being preserved in any trial transcript. However, in the case at bar the repeated references to the "Mafia" from uncontrollable witnesses whose testimony was supported by little corroborative evidence brought prejudicial pressures to bear upon the jury which overwhelmed the court's ability to effectively counteract by cautionary instructions.

Thus, it is not the ruling of this court that the mere mention or suggestive association of an accused with the "Mafia" results in incurable prejudice. This opinion is

limited to the particular facts and circumstances of the case at bar as previously noted, which prejudiced the jury beyond judicial cure.

For the reasons stated, the court finds petitioner is being held in violation of his constitutional rights, and it is therefore ordered that petitioner be released from custody, unless he is granted a new trial within sixty days, during which new trial the testimony discussed herein shall not be used.

Fred. W. Kaess
United States District Judge

APPENDIX D

No. 71-1029

UNITED STATES COURT OF APPEALS
FOR THE 6th CIRCUIT

Joseph Barbara, Jr., *Petitioner-Appellee,* v. Perry Johnson, Warden of the State Prison of Southern Michigan, *Respondent-Appellant.*	APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed October 19, 1971.

Before: Phillips, Chief Judge and Brooks and Kent, Circuit Judges.

Brooks, Circuit Judge. This is an appeal from an order of the District Court granting a writ of habeas corpus to petitioner-appellee, Joseph Barbara, Jr. Barbara was convicted in the state court of the crime of extortion and his conviction was affirmed on appeal. *People v. Barbara*, 23 Mich. App. 540, leave to appeal denied July 16, 1970, 179 N.W.2d 105. Barbara then petitioned the District Court for a writ of habeas corpus alleging that his constitutional right to a fair trial had been violated. Specifically, Barbara contended certain unresponsive answers made during this trial by two prosecution witnesses on cross-examination tended to connect him with the Mafia. He argued the answers were so prejudicial as to deny him a fair trial by an impartial jury. The State of Michi-

gan maintained that Barbara's attorney deliberately asked questions calculated to bring out references to the Mafia for the purpose of inviting error and a mistrial. Also, it maintained that no prejudice resulted from the references that were allegedly provoked and that the jury was properly instructed to disregard any such references as may have indicated any prejudicial tendency. In holding petitioner's constitutional due process rights were violated, the District Court ruled that the cumulative effect of the references was inherently prejudicial and not cured by the trial court's cautionary instructions to the jury to disregard them. We disagree and reverse.

The two principal witnesses for the prosecution in the state court were Mrs. Delores Lazaros and her husband, Peter Lazaros, who allegedly was a close friend of petitioner. Mrs. Lazaros testified that while her husband was in prison, Barbara came to her home on several occasions and, by threatening her life and the lives of her husband and their infant son, succeeded in raping and extorting money from her. Upon the release of her husband from prison, she told him of the incidents and together they informed the authorities resulting in Barbara's indictment, trial and conviction.

Both Barbara and Lazaros had previously been widely publicized in the local press as members of the Mafia, and their reputations were well known to the trial judge and the attorneys. It was for this reason that the trial judge had the witness instructed before they testified not to mention to word "Mafia" unless directly asked a question which would require its use. The word "Mafia" was mentioned one time during the course of the trial that lasted for 8 days, and there were also other references such as "these people", "your people", "them", and the name of a well publicized Mafia informer was mentioned. It is upon

these testimonial responses that petitioner relies to support the contention that he was deprived of a fair and impartial trial.

During trial Lazaros was subject to a lengthy, severe and often abusive cross-examination. Late in the cross-examination defense counsel, with full knowledge of his client's and Lazaros' alleged association with the Mafia, probed him concerning the collateral issue of petitioner's allegedly bribing Internal Revenue agents and also the Mayor of Detroit.[1] Lazaros' response mentioned the word "Mafia" and immediately a motion was made for a mistrial. The judge struck the answer and admonished the jury to disregard it. In denying the motion, he said out of the presence of the jury " . . . this word that we're concerned with has not been emphasized before this jury. This Court is of the opinion that the action of this Court in striking the answer . . . has protected the rights of this defendant. I'm satisfied that this jury will follow the Court's instructions." The trial judge also, at appropriate times, instructed the jury to disregard other irrelevant and volunteered responses of the witnesses.

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[1] "Q. All right. Isn't it true that you've made other accusations against Mr. Barbara, other than the accusation here made by your wife?

A. What you mean by that? Will you explain to me?

Q. Yes, I'll be happy to. Isn't it true that you have made a statement or statements, to certain law enforcement agencies, that at the Kingsley Inn, on or about December the 17th of 1967, Mr. Barbara paid a bribe, not only to certain Internal Revenue agents, but also to Mayor Cavanagh of the City of Detroit?

A. Let me say this to you, while you want to know [defense counsel], Mr. Barbara, at that time he delivered the money, representing the Mafia, to give—

[Defense counsel] All right, your Honor, I move for a mistrial.

A. You asked me."

As the record discloses, the crime for which petitioner was convicted with all its sordid details, the association of petitioner and Lazaros with the Mafia, their backgrounds, temperaments and reputations, the antagonism existing between Lazaros and defense counsel, who at one time had represented him, all contributed to create a trial charged with emotion. In such a setting, and even without provocation, spontaneous and unresponsive statements may be all but impossible to prevent. With provocation they are to be expected.

The trial strategy adopted by the defense was inherently provocative. Its aim was to completely destroy the credibility of the two principal witnesses for the prosecution. And in attacking their credibility, evidence was induced, primarily on the cross-examination of Peter Lazaros, of numerous collateral matters[2] which had no direct application to the crime of extortion for which petitioner was being tried. This evidence of collateral matters, however, successfully portrayed petitioner and Lazaros as being sinisterly linked with organized crime. Thus, a substantial doubt is presented as to whether the fleeting references to the Mafia could reasonably be presumed to have deprived petitioner of a fair trial, even in the absence of cautionary instructions.

The general rule is that the subsequent striking of erroneously admitted evidence accompanied by a clear and positive instruction to disregard it cures the error unless the evidence is of such an exceptionally prejudicial character that its withdrawal from the consideration of the jury cannot remove the harmful effect caused by its admission.

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[2] e.g. Threats to kill; bodyguards; bribery; $130,000 swindle; blackmail; legal fees paid of $150,000, $200,000; and intimations of alleged judicial improprieties in high places.

Bruton v. United States, 391 U.S. 123 (1968); *United States v. Greene,* 400 F.2d 847, 848 (6th Cir. 1968); *United States v. Farber,* 336 F.2d 586, 589 (6th Cir. 1964); *United States v. Levinson,* 405 F.2d 971 (6th Cir. 1968), *cert. denied Strang v. United States,* 395 U.S. 906 (1969); *cert denied Howard v. United States,* 395 U.S. 958 (1969); and *Levinson v. United States,* 395 U.S. 958 (1969), *rehearing denied,* 396 U.S. 869 (1969). The rationale for the general rule is set forth in *Bruton v. United States, supra,* at page 135:

> "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, ushally inadvertently. 'A defendant' is entitled to a fair trial but not a perfect one.' *Lutwak v. United States,* 344 U.S. 604, 619; see *Hopt v. Utah,* 120 U.S. 430, 438; cf. Fed. Rule Crim. Proc. 52(a). It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in *Jackson v. Denno,* supra, [378 U.S. 368], there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

The authorities also agree, particularly where the allegadly prejudicial evidence came through or was provoked by the prosecution, the burden of establishing that the accused was unafirly treated rests upon the accused. *United States ex rel. Darcy v. Handy,* 351 U.S. 454, 462 (1956); *Adams v. United States ex rel. McCann,* 317 U.S. 269, 291

(1942); *United States v. Rubino*, 431 F.2d 284 (6th Cir. 1970). And as stated in *United States ex rel. Darcy v. Handy, supra*, at page 462, it is necessary "... that it [the burden of proof] be sustained not as a matter of speculation but as a demonstrable reality."

Applying these rules to the bizarre circumstances of this case and having considered the complete transcript of the trial, we conclude as did the state judge and the Michigan Supreme Court that even if the challenged testimony could be deemed prejudicial, its effects were cured by the cautionary instructions of the court. Petitioner has failed to establish that he was deprived of his constitutional right to a fair trial.

The order granting the writ of habeas corpus is vacated and this proceeding is remanded to the District Court with instructions to dismiss the petition.

APPENDIX E

ORDER DENYING PETITION FOR REHEARING

U.S. Court of Appeals—Sixth Circuit

(Filed Nov. 19, 1971)

Joseph Barbara, Jr.,
Petitioner-Appellee,
v.
Perry Johnson, Warden of the State Prison of Southern Michigan,
Respondent-Appellant.

ORDER
No. 71-1029

Before: PHILLIPS, Chief Judge, and BROOKS and KENT, Circuit Judges

The petition of the petitioner for rehearing en banc has been considered. None of the judges of this Court who are in regular active service has favored ordering consideration en banc.

It is ordered that the petition is denied.

Entered by order of the Court
James A. Higgins,
Clerk.